Declaration of
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Regarding an Analysis of Studies Pursuant to Section 257 of the Telecommunications Act of 1996 and Section 309(j) of the Communications Act of 1934
With Respect to Constitutionally Permissible Means of Implementing Minority Ownership Policies
In Response to the Commission's Media Bureau Public Notice DA 04-1690
Seeking comment on ways to further the mandate contained in
Section 257 of the Telecommunications Act of 1996, 47 U.S.C. § 257.

The author has provided an analysis of the studies undertaken at the request of the Commission, and other studies and materials, addressing issues related to minority ownership in the broadcast and wireless industries relevant to the FCC's section 257 inquiry. The analysis is provided in the author's capacity as a consultant to the Minority Media and Telecommunications Council ("MMTC"), although the analysis and any conclusions are those of the author and do not necessarily reflect the views of MMTC.

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ANALYSIS OF STUDIES PURSUANT TO SECTION 257 OF THE TELECOMMUNICATIONS ACT OF 1996 AND SECTION 309(J) OF THE COMMUNICATIONS ACT OF 1934 WITH RESPECT TO CONSTITUTIONALLY PERMISSIBLE MEANS OF IMPLEMENTING MINORITY OWNERSHIP POLICIES

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I. INTRODUCTION

This analysis is prepared for the Minority Media and Telecommunications Council ("MMTC") in response to Notice published by the Media Bureau of the Federal Communications Commission ("FCC") calling for comments "on constitutionally permissible ways to further the mandates of Section 257 of the Telecommunications Act of 1996, 47 U.S.C. § 257, which directs the FCC to identify and eliminate market entry barriers for small telecommunications businesses, and Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j), which requires the FCC to further opportunities in the allocation of spectrum-based services for small businesses and businesses owned by women and minorities." Public Notice DA 04-1690, June 15, 2004.

The analysis includes consideration of the constitutional standards for permissible consideration of race[1] by government entities, including those enunciated in the recent decisions, *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), and of the basis in evidence for race-conscious measures provided by the six studies of market entry barriers commissioned by the FCC and referred to in the Notice (hereafter "Section 257 Studies"), as well as other studies and material. The analysis identifies available avenues for the FCC to act to fulfill the statutory mandates of Sections 257 and 309(j), as well as additional steps that can be taken to further these statutory objectives in a constitutionally permissible manner.

A. Scope of Analysis

1. Standards and Interests

The analysis considers constitutional standards and interests relevant to the consideration of race in governmental action, as well as the interests identified by Congress in legislation relating to the FCC and its mission, and by the FCC itself in various forms. The analysis also considers the history of FCC policies, practices and measures, as discussed in the Section 257 Studies and in FCC orders and decisions and judicial

[1] The MMTC requested only an analysis of permissible measures to promote license ownership by racial minorities, thus, this report does not address available measures to promote ownership by women. Unless otherwise indicated, use of the term "race" is intended to include national origin. Use of the term "minorities" is intended to refer collectively to African Americans, Hispanic Americans, Asian Americans and Native Americans.

decisions. In addition, other federal legislation is considered in relevant respects, including the Transportation Equity Act for the 21st Century of 1998 ("TEA-21") and Title VI of the Civil Rights Act of 1964 ("Title VI").

2. Studies and Sources of Evidence

The studies of market entry barriers commissioned by the FCC referenced in the Notice are, of course, given substantial consideration in this analysis. To the extent that other sources of relevant evidence and analysis are available to the FCC, they are also considered. This is appropriate given the temporal and structural limitations of some of the market entry barrier studies and the latitude afforded the FCC in considering evidence in formulating policy. In particular, recent decisions upholding the constitutionality of race-conscious measures in TEA-21 make clear that external sources of evidence appropriately may be considered as a basis for such measures. See *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-69 (10th Cir. 2000), cert. dismissed as improvidently granted, 534 U.S. 103 (2001). All of these sources are considered with respect to race-conscious measures that currently may be available to the FCC, as well as further steps that may be taken to establish a basis for, and to design, race-conscious measures. All of these sources are identified in the analysis.

3. Nature of the Analysis

This analysis considers the means by which the FCC can fulfill the mandates of Sections 257 and 309(j), including race-conscious measures, on the basis of available evidence and within appropriate constitutional standards. This document does not present economic or statistical analysis of any evidence or material. Such analysis is beyond the scope of this document. Rather, that scientific analysis which is employed in various studies is considered as presented and, within the qualification of the author,[2] some assessment of the data, methods and conclusions of the economic, statistical or other scientific analysis contained in the studies is provided.

B. Materials Considered

As noted, this document attempts to identify and include consideration of all evidence, information and analysis available to the FCC in responding to its statutory mandates and considering the availability of race- and gender-conscious and other measures. These are identified below.

1. Market Entry Barrier Studies

These studies, conducted pursuant to Section 257 of the Telecommunications Act of 1996, 47 U.S.C. § 257, and Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j), are:

[2] See p. 70.

1. Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming? (referred to as the "Content/Ownership Study");

2. Study of the Broadcast Licensing Process, consisting of three parts: History of the Broadcast Licensing Process; Utilization Rates, Win Rates and Disparity Ratios for Broadcast Licenses Awarded by the FCC; and Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC (referred to as the "Broadcasting Licensing Study");

3. FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions (referred to as the "Auction Utilization Study");

4. Study of Access to Capital Markets and Logistic Regressions for License Awards by Auctions (referred to as the "Capital Markets and Auctions Regression Study") *aka* "Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes;"

5. Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present (referred to as the "Historical Study"); and,

6. When Being No. 1 Is Not Enough: the Impact of Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations (referred to as the "Advertising Study") (released January, 1999).

These studies were available from the FCC as indicated in the Notice.

2. Other Studies and Materials

1. *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States*, The Minority Telecommunications Development Program, National Telecommunications and Information Administration, United States Department of Commerce (December 2000)

2. *The State of Minority Business, 1997 Survey of Minority-Owned Business Enterprises, An Initial Analysis plus Policy and Research Implications*, U.S. Department of Commerce Minority Business Development Agency (2001)

3. *Minority Commercial Broadcast Ownership In The United States* United States Department of Commerce National Telecommunications and Information Administration Minority Telecommunications Development Program, http://www.ntia.doc.gov/opadhome/minown98/

II. STANDARDS FOR CONSIDERATION OF RACE AND GENDER BY GOVERNMENT ENTITIES

The constitutional standards for consideration of race-conscious actions by government entities have developed substantially over the past fifteen years. In the last several years—the period since the Section 257 Studies were submitted—rather dramatic developments have occurred in decisions regarding consideration of race-conscious government action. More specifically, only last year, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court squarely held that diversity was a compelling interest in the context of admissions to institutions of higher learning. In addition, Courts of Appeals have upheld the constitutionality of race-conscious federal highway contracting provisions in TEA-21 and in a municipal contracting program, all of which the Supreme Court has left undisturbed. See *Sherbrook Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir 2003), cert. denied *Gross Seed Co. v. Department of Transportation*, ___ U.S. ___, 124 S.Ct. 2158 (2004), *and Sherbrook Turf, Inc. v. Minnesota Department of Transportation*, ___ U.S. ___, 124 S.Ct. 2158 (2004) (TEA-21); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), cert. dismissed as improvidently granted, 534 U.S. 103 (2001) (TEA-21); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir.), cert. denied, ___ U.S. ___, 124 S.Ct. 556 (2003) (municipal contracting plan); see also *Northern Contracting, Inc. v. State of Illinois*, No. 00 C 4515, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. March 4, 2004) (granting federal defendants' motion for summary judgment in challenge to constitutionality of TEA-21); *Western States Paving Co., Inc. v. Washington Department of Transportation*, No. C00-5204 RBL (W.D. Wa., September 3, 2003) (granting federal and state defendants' motion for summary judgment in challenge to constitutionality of TEA-21); and *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp. 2d 725 (ND Ill. 2003) (holding city contracting program supported by compelling interest, but not narrowly tailored; injunction stayed for adoption of narrowly tailored program). A brief overview of the development and application of these standards is provided here. A discussion of how these standards apply with respect to the evidence regarding FCC licensing is discussed in the following sections.

A. Strict Scrutiny

In *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court held that race-conscious action by municipal governments was subject to "strict scrutiny," that is, that race could be considered only in furtherance of a "compelling governmental interest" and through means that were "narrowly tailored" to accomplish that compelling end. One year later, in *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), the Court held that federal legislation that included the benign consideration of race was subject to "intermediate scrutiny," that is, that it furthered "important interests" and is "substantially related to achievement of those objectives." Five years later, in *Adarand Constructors, Inc, v. Pena*, 515 U.S. 200 (1995), the Court overruled *Metro Broadcasting* insofar as it applied intermediate scrutiny to race-conscious federal legislation, and held that "strict scrutiny" applied to all governmental consideration of

race. Most recently, last year, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court reaffirmed the applicability of the strict scrutiny standard.

B. Compelling Governmental Interest

The Supreme Court, thus far, has identified two interests as sufficiently "compelling" to satisfy the first element of the strict scrutiny standard. In a series of cases, most recently *Croson* and *Adarand*, the Court has long held that remedying discrimination and the effects of past discrimination is a compelling interest. Last year, in *Grutter*, the Court held that achieving diversity in admissions to institutions of higher education is a compelling interest, consistent with the opinion of Justice Powell in *Regents of University of California v. Bakke, 438 U.S. 265 (1978)* (opinion of Powell, J.) While the Court has rejected other interests as not sufficiently compelling, such as remedying general societal discrimination, achieving simple racial balance, and providing role models, see *Grutter*, 539 U.S. at 323-24; *Croson*, 488 U.S. at 496-98; *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986), the outcome in *Grutter* and language in other cases make clear that the potential remains for other interests to be recognized as compelling. See *Wygant, 476 U.S., at 286* (O'Connor, J., concurring in part and concurring in judgment) ("nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."). And, indeed, the lower courts have found other interests compelling. See, e.g., *Comfort v. Lynn*, 283 F.Supp.2d 328, 386 (D. Mass. 2003) (reducing racial isolation that prevented school system from providing basic quality educational opportunities "is indeed a compelling interest that can justify race-conscious student assignment."); *Brewer v. W. Irondequoit Central Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000) (compelling interest in reducing racial isolation); *Parent Ass'n of Andrew Jackson High School v. Ambach*, 738 F. 2d 574 (2d Cir. 1984) (same); *Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F. 2d 705, 717-21 (2d Cir. 1979) (same).

1. Remedying Discrimination

As noted, it has long been held that remedying discrimination and the continuing effects of past discrimination is a compelling interest. Although the Supreme Court generally has expressed the view that remedying "general societal discrimination" is too amorphous to represent a compelling interest, See *Wygant*, 476 U.S. at 276 (plurality opinion); *Croson*, 488 U.S., at 496-498 (plurality opinion); *id.*, at 520-521 (Scalia, J., concurring in judgment), it consistently has held that remedying identified discrimination related to the subject of the measures is compelling. See *Grutter*, 539 U.S. at 328; *Adarand*, 515 U.S. at 237. The Court, and lower courts applying its precedent, have held that government entities have a compelling interest in remedying their own discrimination and any continuing effects, as well as discrimination on the part of other actors in an industry or market in which the government entity has acted as a "passive participant." *Croson*, 488 U.S. 491-93, 498-506; *Adarand*, 288 F.3d at 1164-65, quoting *Concrete Works of Colorado, Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th

Cir. 1994); *Sherbrook Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 968 (8th Cir. 2003); *Concrete Works of Colorado, Inc. v. City & County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003).

a. Governmental Discrimination

It is beyond question that a government entity has a compelling interest in remedying discrimination and the effects of past discrimination in which it has engaged. For example, where a government has discriminated in contracting or employment, it has a compelling interest in remedying that discrimination and any continuing effects. *Croson*, 488 U.S. at 509. In order to establish such an interest, a government need not concede its liability, see *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 630 (1986); *id.*, at 650, 652 (O'Connor, J., concurring in judgment); *Wygant,* 476 U.S., at 290 (O'Connor, J., concurring in part and concurring in judgment), but must only establish "a strong basis in evidence" that discrimination has occurred. *Croson.*, 488 U.S. at 500; *Wygant*, 476 U.S. at 277. This showing need not constitute conclusive proof of discrimination and its effects, but evidence that presents something approaching a prima facie case, or initial showing of the likelihood, that discrimination has occurred. *Croson*, 488 U.S. at 500, 501-02; see *Concrete Works*, 321 F.3d at 971 quoting *Croson*, 488 U.S. at 500. ("Strong evidence is that 'approaching a prima facie case of a constitutional or statutory violation,' *not* irrefutable or definitive proof of discrimination.").

A showing of a compelling interest in remedying discrimination commonly is made through statistical disparities between those members of a particular race employed or contracted by the entity and availability of the members of that race for the employment or contracting at issue in the market. *Croson*, 488 U.S. at 500; *Johnson*, 480 U.S. at 631-32; *id.*, at 651-52 (O'Connor, J., concurring in judgment); *Wygant,* 476 U.S. at 277. Such statistical analyses need not conclusively demonstrate discrimination or disprove other theories for the existence of such disparities. *Croson*, 488 U.S. at 500, 501-02; *Concrete Works*, 321 F.3d at 991. Other forms of direct and circumstantial evidence may be used to establish such a strong basis in evidence. *Croson*, 488 U.S. at 509; *Johnson*, 480 U.S. at 633 n. 11; *id.*, at 652-53 (O'Connor, J., concurring in the judgment); *Concrete Works*, 321 F.3d at 958.

Where a government has made such an initial showing, any challenger to the measures bears the burden of proving that the government's "evidence did not support an inference of prior discrimination and thus a remedial purpose. *Adarand*, 288 F.3d at 1166, quoting *Concrete Works of Colorado, Inc. v. City & County of Denver*, 36 F.3d at 1522-23 (quoting *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring); *Wygant*, 476 U.S. at 277-78 (plurality opinion); see *Johnson*, 480 U.S. at 626. A party challenging the government's showing "must introduce 'credible, particularized evidence to rebut [that] initial showing of the existence of a compelling interest.'" *Concrete Works*, 321 F.3d at 959 quoting *Adarand*, 228 F.3d at 1175

b. Passive Participation

Government units also have a compelling interest in remedying discrimination where it has not been the discriminatory actor, but has been a participant in a in a market or industry in which discrimination has adversely affected the opportunities of minorities. This is often referred to as "passive participation," and proceeds from the principle that the government has a compelling interest in ensuring that public funds, resources and opportunities are not used in a discriminatory manner, and do not fuel, promote or perpetuate discrimination or the continuing effects of past discrimination. *Croson*, 488 U.S. at 492-93 citing *Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *id.*, at 509.

Discrimination in markets and industries includes, first, that which adversely affect the ability or opportunity of minorities to qualify or participate in fields of endeavor, often referred to as discrimination affecting "business formation," and, second, discrimination affecting the "utilization" of existing minority businesses or barriers to the ability of those businesses fairly to compete in the market. *Adarand*, 288 F.3d at 1167-72; *Sherbrook Turf*, 345 F. 3d at 970. Forms of discrimination recognized to affect business formation include denial of access to capital, exclusion from racially segregated industry networks, such as "old boy" or family connections to opportunities, and discrimination in access to training, experience and exposure that can lead to participation in, or qualification for entry into, the industry, such as discrimination in union or employment opportunities. See *Adarand*, 288 F.3d at 1168-70; *Concrete Works*, 321 F.3d at 964-65, 967, 977-78, 990-91 Forms of discrimination recognized as affecting the utilization of minorities or their ability to compete in the market include exclusion from contracting opportunities with others in the industry, avoidance of doing business with minorities, for example, through "bid shopping" for non-minority associates, discrimination by suppliers in pricing and access to materials or resources, and discrimination in access to surety bonds or financing. See *Adarand*, 288 F.3d at 1170-75; *Concrete Works*, 321 F.3d at 962-67, 968-69.

Where evidence of these forms of discrimination has been demonstrated, courts have found a strong basis in evidence of the compelling interest in remedying discrimination, and have approved narrowly tailored means of consideration of race in decisions regarding participation in contracting and employment involving government resources.

2. Preventing Discrimination

A companion to the interest in remedying discrimination is that of preventing discrimination. Measures to prevent discrimination, as well as restorative measures, are certainly called for when discrimination has occurred: "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

But the analytically distinct interest in preventing discrimination exists even in the absence of demonstrated discrimination. Preventing a violation of non-discrimination laws and assuring compliance with those laws, including those prohibiting acts with discriminatory effects, is a compelling governmental interest. See *Bush v. Vera*, 517 U.S. 952, 977, 990-92 (1996) (O'Connor, J., concurring) ("compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest"); *id.*, at 1004, 1033-35 (Stevens, J., dissenting); *id.*, at 1046, 1065 (Souter, J., dissenting); see *Richmond v. J. A. Croson Co.*, 488 U.S. at 494, 509-10 ("States and their local subdivisions have many legislative weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement"); *cf United Steel Workers v. Weber*, 443 U.S. at 208. Preventing discrimination serves the same constitutionally-based anti-discrimination interest as remedying discrimination, but is distinguished by its forward-looking orientation and focus on compliance with civil rights laws and principles of equal opportunity, rather than on repairing injuries that have resulted from discrimination. Many comprehensive programs characterized as remedial include measures that are preventative, such as reviewing and revising policies to eliminate the causes of discrimination, collecting and analyzing data, engaging in critical self evaluation of practices and their effects and taking affirmative measures to produce non-discriminatory results, all to ensure compliance with civil rights laws. See *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 620-22; *id.*, at 650, 653 (O'Connor, J, concurring in the judgment).

Consideration of race is permissible for the purpose of complying with anti-discrimination laws. Indeed, decisions made with a consciousness of race that otherwise conform to proper considerations and standards may not implicate strict scrutiny. See *Bush v. Vera*, 517 U.S. at 993 (O'Connor, J., concurring).[3] To the extent that strict scrutiny is implicated, "the state interest in avoiding liability under [antidiscrimination law] is compelling." *Id.*, at 994 (O'Connor, J., concurring) citing *id.* at 1033 (Stevens, J., dissenting); *id.*, at 1065 (Souter, J., dissenting). Race may be considered where facts are present suggesting the elements of a potential violation and this "'strong basis in evidence' need not take any particular form, although it cannot simply rely on generalized assumptions about th[ose elements]." *Id.*

Thus, consideration of race for purposes of preventing discrimination is justified by a compelling interest that arises from circumstances suggesting the presence of elements of a potential violation. Forward looking measures designed to prevent or protect against discrimination that consider and act on race are justified independently from restorative measures supported by the compelling remedial interest.

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[3] In her concurring opinion in *Bush*, 517 U.S. at 993, Justice O'Connor identified a majority of the Court in agreement that, in the context of redistricting, "so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. See *ante*, at 958-959 (plurality opinion); *post*, at 1008-1011, and n. 8, 1025 (STEVENS, J., dissenting); *post*, at 1056, 1065, 1073 (SOUTER, J., dissenting). Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply. *Ante*, at 962, 964, 978 (plurality opinion)."

3. Interest in Diversity

As noted above, *Grutter* established that diversity in admissions to institutions of higher education was a compelling interest that satisfied the first prong of strict scrutiny. This decision ended an extended period of uncertainty regarding the weight of the diversity interest and the continuing vitality of Justice Powell's opinion in *Bakke*, recognizing a university's legitimate educational concern in selecting a student body in furtherance of its First Amendment interests in academic freedom. Lower courts have assumed or found diversity to be a compelling interest in contexts other than higher education, as discussed below.

a. Diversity in Higher Education

As noted above, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court determined that the articulation of diversity as a compelling interest in the selection of a student body at institutions of higher education by Justice Powell in *Regents of University of California v. Bakke, 438 U.S. 265, 311-313 (1978)* (opinion of Powell, J.) was correct. And in both *Grutter* and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court made clear the parameters of narrow tailoring in the application of that compelling interest in the higher education context. Thus, it is now settled that diversity is a permissible basis for consideration of race in college admissions so long as race is considered as a "plus" factor, together with other factors that would serve the diversity interest in a process of individualized consideration of all candidates.

b. Diversity in Other Contexts

i. Broadcast Diversity

In *Metro Broadcasting*, the Court held that "broadcast diversity" was an "important interest" that satisfied intermediate scrutiny. That particular holding was not disturbed by *Adarand*, and it may have continuing relevance in light of the subsequent decision regarding diversity in higher education in *Grutter* and the decisions of some lower courts. Because *Metro Broadcasting* applied intermediate scrutiny, the Court did not need to, and did not, reach the question whether broadcast diversity rose to the level of a compelling interest. Thus, the *Metro Broadcasting* decision does not establish broadcast diversity as an interest that would satisfy the prevailing compelling interest standard of strict scrutiny. Nevertheless, the recognition in *Grutter* of diversity as a compelling interest in the context of higher education, and its description of the value of diversity in public institutions, leadership and business, raise the question whether a carefully articulated and supported interest in broadcast diversity would now receive similar recognition by the Court.

ii. Diversity in Education and Employment

As noted above, lower courts have recognized or assumed diversity to be a compelling interest in the context of assignment of students in elementary and secondary education. See *Parents Involved in Community Schools v. Seattle School District No. 1*, 377 F.3d

949, 964 (9th Cir. 2004); *Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1067 (9th Cir. 1999); *Eisenberg v. Montgomery Co.*, 197 F.3d 123, 130 (1999); *Tuttle v. Arlington Co.*, 195 F.3d 698, 701 (4th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998); *McFarland v. Jefferson Co. Public Schools*, 330 F. Supp. 2d 834 (W.D. Ky. 2004). Diversity has also been recognized as a compelling interest in faculty selection. In addition, an interest in diversity has been recognized as sufficiently compelling to satisfy strict scrutiny in the context of hiring and assigning police officers. See *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003) (diverse leadership of police department was "operational necessity" justifying test scores adjusted by race); *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996); but see *Taxman v. Bd. of Ed. of Township of Piscataway*, 91 F.3d 1996) cert. dismissed 522 U.S. 1010 (1997).

Thus, the interest of diversity conclusively has been established as compelling in higher education and increasingly has been recognized in courts of appeals and district courts as a compelling in other aspects of education and in employment.

4. Interests Identified in Statutes

The Communications Act of 1934, as amended, and other legislation has defined and shaped the important role and mission of the FCC in the administration of the electromagnetic spectrum "in the public interest." Because the Court has not foreclosed consideration of other interests as compelling, the interests contained in these statutes and in the experience and operations of the FCC bear examination to assess the prospect that they may be found to be compelling such as to provide a basis for measures that include the consideration of race. These interests include promoting competition and promoting universal service.

C. Narrow Tailoring

The strict scrutiny standard requires not only a compelling interest, but that consideration of race be narrowly tailored to achieve the compelling purpose. The factors relevant to narrow tailoring were first articulated in *U.S. v. Paradise*, 480 U.S. 149 (1987). Four aspects of the manner in which race-conscious measures are used are assessed to determine whether consideration of race is narrowly tailored. These include the necessity for the relief and the availability and efficacy of race-neutral measures, the flexibility and duration of race-conscious measures, the appropriateness of any numerical goals in relation to the interest, and the impact of the race-conscious measures on third parties. *Id.*, at 171. These factors and their application have been discussed in subsequent cases, in both the remedial and diversity context.

III. COMPELLING INTERESTS OF THE FCC

A primary question addressed in this report is whether the FCC can utilize race-conscious measures to promote minority ownership of licenses. As indicated in the discussion of applicable standards, above, the answer to this question depends upon whether such measures can be designed consistent with the strict scrutiny standard by which they are

evaluated. The initial inquiry must be whether there are one or more compelling interests that justify consideration of race by the FCC. The second, and equally important, question is whether the means selected are narrowly tailored to accomplish the compelling interest or interests. This section addresses the issue whether the Section 257 Studies and other available evidence support one or more compelling interests in connection with minority ownership of licenses issued and administered by the FCC. The Section that follows will address considerations of narrow tailoring race-conscious measures to accomplish any identified compelling interests.

The Section 257 Studies, together with other studies, regarding past and present policies of the FCC and evidence relating to the broadcasting and wireless industries, suggest that the FCC and Congress have compelling interests that would be served by measures to increase minority ownership of broadcast and wireless licenses. For ease of identification, these interests are discussed individually below, although in some respects they may be interrelated or overlap.

A. Remedying Discrimination

The FCC has not heretofore premised any minority ownership policies on a purpose of remedying discrimination. Although consideration of the race of prospective ownership in FCC policies has been motivated by the absence of minority broadcasters and of viewpoints and messages that represent minority voices, these measures have always been premised upon the concept of broadcast diversity. This has represented a somewhat indirect approach to remedying the exclusion of minorities from the broadcast and telecommunications industry and may have confounded consideration of the propriety of these measures. Nevertheless, the prospect of race-conscious minority ownership measures premised on the compelling remedial justification remains available to the FCC, as Justice O'Connor recognized in dissent in *Metro Broadcasting*: "The FCC or Congress may yet conclude after suitable examination that narrowly tailored race-conscious measures are required to remedy discrimination that may be identified in the allocation of broadcasting licenses. Such measures are clearly within the Government's power." *Metro Broadcasting, Inc. V. Federal Communications Commission*, 497 U.S. 547, 611 (1990) (O'Connor, J., dissenting)

Investigation of the basis for a remedial consideration of race and ethnicity was one purpose of the Section 257 Studies commissioned by the FCC. Those studies are examined here for the contributions they make in establishing such a basis, both with respect to the policies, practices and operations of the FCC and the broadcast and telecommunications industry which it has bred and shaped and which it administers and regulates. In addition, other sources of available evidence are considered.

The "Broadcasting Licensing Study," "Auction Utilization Study," "Capital Markets and Auctions Regression Study," "Historical Study" and the "Advertising Study" considered in light of the history and impact of FCC policies and practices, together with evidence regarding the broadcasting and wireless industries, suggest that the FCC clearly has a compelling interest in remedying discrimination regarding license ownership.

1. Discrimination in the Administration of Public Resources

An assessment of the FCC and its operation must begin with recognition of the unique position and extraordinary influence the FCC wields with respect to the broadcast and wireless industries. The Communications Act of 1934, as amended, assigned to the FCC exclusive authority to grant licenses, based on "public convenience, interest, or necessity," to persons wishing to construct and operate radio and television broadcast stations. See 47 U. S. C. § § 151, 301, 303, 307, 309. The fact that these resources are both unique and scarce and that the FCC's authority to grant licenses and regulate their use is exclusive has several important implications. First, the FCC essentially exercises sole control over access to, and the use of, these resources. While there is a secondary market for spectrum licenses, the original ownership of licenses, their transfer and the conditions under which they can be utilized are subject to controls, limitations, ongoing supervision and renewal by the FCC. Second, as the primary government regulator of spectrum, the FCC plays a role in the broadcast and wireless industries that is extremely different from the role played by the government generally in the procurement or contracting process. While the government's role in procurement is primarily as a consumer of goods and services, the FCC's role in in broadcasting and wireless is more akin to a public trustee, to ensure that they operate in a manner that serves the public interest.

These unique realities have important consequences. First, as the exclusive source and governor of these industries and their essential resources, the FCC policies and actions are magnified well beyond those of governments participating in the economy generally. Second, because the FCC has regulatory authority over the most significant and influential actors in the broadcast and wireless industries, it has the ability to influence the means by which individuals gain experience and training for, or entry into, these industries. The FCC largely has determined those who could enter these industries, the terms on which they have entered, and the conditions under which the participants must provide to others access to employment, experience and participation in these industries.

A further consequence of the unique and exclusive role of the FCC is that there is no larger industry to which one can look for the availability of persons of various racial and ethnic groups by which to measure and evaluate their participation or "utilization" in the broadcast and wireless industries. Unlike government contracting cases, one cannot look to a broader, existing industry to determine the rate of participation of various racial groups in, for example, highway construction or engineering, so as to measure whether government units or their prime contractors may be discriminating against minorities in contracting in those areas. While there is no such readily available comparative data, it can also be said that, other than the choices of individuals, the racial and ethnic composition of owners and participants in the broadcast and wireless industries is the result of decisions of the FCC, its licensees and those adjunct to these industries, such as lenders, brokers, advertisers and others.

Within this context, the policies of the FCC and the operation of the broadcast and wireless industries are examined.

a. Limited Data and Apparent Indifference of the FCC

This analysis must begin by noting that there are limitations on available evidence regarding the policies and operations of the FCC since its inception. For example, the Historical Study examined the licensing process beginning in 1950, see "Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, 1950 to Present," p. 1, sixteen years following creation of the FCC and thirty eight years after broadcast licenses were first granted. Similarly, the Broadcasting Licensing Study examined the results of FCC comparative hearings only for periods from 1978-1981 and 1989-1993, as the researchers were unable to collect comprehensive information for earlier periods. See "Utilization Rates, Win Rates and Disparity Ratios for Broadcast Licenses Awarded by the FCC," p. 11, n. 8.[4]

These limitations on data have significance for an analysis of the FCC and the broadcast industry. First, there is a lack of systematically collected data regarding the FCC and its operations prior to 1950, and empirical data prior to 1978, during the critical period when a substantial number of licenses were distributed and the foundation and essential features of the broadcast industry were established. Second, the empirical study of the FCC's broadcasting licensing covers only periods when FCC policy provided credits for minority applicants, see "Utilization Rates, Win Rates and Disparity Ratios for Broadcast Licenses Awarded by the FCC," p. 11-12.[5] Thus, there is no statistical analysis of the FCC's broadcast licensing process during most of its life, when it operated without measures to enhance minority ownership. Stated simply, there is no statistical analysis of whether the licensing process was discriminatory in the many decades prior to, and the years since, measures to increase minority ownership.

Indeed, the absence of systematic data in the files of the FCC concerning the racial and ethnic ownership of licenses, the racial outcomes of the comparative hearing process and

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[4] The Capital Markets Study utilized data from license holders in 1999; see "Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes," p. 18, the Advertising Study used data from 1996 and 1997, see "When Being No. 1 Is Not Enough: the Impact of Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations," pp. 10-11, the Auction Utilization Study used data from wireless license auctions the dates of which are not identified in the report, see " FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions," p. 8, n. 7, and the Content/Ownership Study used data from 1998, see "Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?," p. 5.

[5] As noted in the Section 257 Studies, FCC policy provided for credit to be given to applications for broadcast licenses that included minority participation from 1978 to 1993 in the comparative hearing process, and until 1995 in the auction process. Beginning in 1973, by virtue of judicial decision, the FCC was to provide credit for minority applicants in the comparative hearing process under certain circumstances. See *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973).

other means of distributing licenses, and racial data on employment in the industry, is troubling. The FCC acknowledged that racial discrimination and underrepresentation was a problem in the industry at least following the Kerner Commission Report, and it adopted employment non-discrimination and equal employment opportunity policies in 1969 and 1975, and minority ownership policies in 1978, recognizing the "[a]cute underrepresentation of minorities" in broadcast ownership, and specifying measures to confront these problems. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978); see *id.*, at 978-91. Yet the FCC did not systematically collect, organize, analyze or report data on the problems it identified and that its policies were intended to affect; a fact apparent from the difficulties all of the researchers report in obtaining data on race for their studies.

At a minimum, this raises the question whether the FCC was, in fact, institutionally interested in the problems of race identified in these policies, or committed to the solutions that were the object of these policies. One would expect, at least, that data would have been collected to assess the efficacy of the policies and to determine whether progress was being made. The Historical Study offers the views of participants on this subject. With respect to the comparative hearing process and licensing, it was suggested that the FCC deliberately refused to collect and analyze statistics regarding race and ownership in order to avoid being held accountable for the fact that minorities were not being awarded licenses through that process. See Historical Study, at p. 102. With respect to employment data, it was reported that the FCC has never systematically examined the data regarding the performance of its licensees or considered this data in renewal proceedings. *Id.*, at p. 100.

Whatever the explanation, the failure of the FCC to analyze this data and act on it, as appropriate, to address the identified problems and achieve the intended goals, reflects an appalling indifference on the part of the agency. With its exclusive powers over the industry, the FCC had a responsibility to ensure that its practices and those to whom it granted licenses to act in the public interest were non-discriminatory and fair, and to act effectively to remedy any discrimination, past and present, and its effects. See *Green v. County School Board*, 391 U.S. 430 (1968). In addition, as an agency that adopted race-conscious measures, it has been clear, at least since 1980, that the use of such measures is to be monitored and periodically reviewed by the agency. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The FCC could discharge neither of these responsibilities without collecting, analyzing and acting on this data. The absence of systematic data collection and analysis strongly suggests that the FCC defaulted in its obligations to prevent or inform itself of discrimination in its processes and the industry and it evaluating the efficacy of the measures it adopted.

b. FCC Policies and Their Effects

Notwithstanding this lack of systematic data, information is available through this period from a variety of sources, including FCC and judicial decisions, some of which are noted in the Section 257 Studies. These sources provide important information regarding the operation of the FCC the broadcast industry during its formative stage.

First, the Historical Study reports no evidence that the FCC directly engaged in discrimination. For example, it notes that the first application by an African American for a broadcast license was not filed with the FCC until 1960, but presents no evidence that the FCC prohibited, refused or discouraged such applications prior to that time. Historical Study, at p. 8. The Study reports that interviewees generally suggested that, rather than engaging in direct intentional discrimination, the FCC failed to enforce non-discrimination policies and allowed discrimination by others adversely to affect the opportunities of minorities, *id.*, at pp. 87-89, 91-93, 99-100, and acted in a manner to avoid assisting minorities in obtaining licenses. *Id.*, at pp. 93-94, 102. It should be noted, however, that this method of collecting data on FCC actions and policies has significant limitations, as some interviewees for the Study indicated a reluctance to criticize the FCC, in the past and at the time, for fear of some form of adverse reaction in their dealings with it. *Id.*, at p. 124-25.

Second, the record of FCC decisionmaking establishes beyond reasonable dispute that the FCC licensed entities which discriminated against African Americans and others on the basis of race in programming and employment, tolerated that discrimination and was, at best, reluctant to act on evidence of discrimination with respect to licensing decisions. Indeed, the record demonstrates that the FCC resisted the efforts of public interest organizations and court rulings to have it consider and end such discrimination by licensees through enforcement of policies, for example, related to programming and the "fairness rule." Non-profit organizations consistently have suggested a number of examples of the FCC's tolerance or facilitation of discrimination. See, e.g., *Comments of the Minority Media and Telecommunications Council*, In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, March 19, 2002; *Comments of EEO Supporters*, In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, March 5, 1999. But two examples, as to which there is no dispute, establish and illustrate the disturbing record of the FCC in tolerating discrimination by its licenses and insulating that behavior from licensing consequences.

Office of Communication of the United Church of Christ v. FCC (UCC II), 425 F.2d 543 (D.C. Cir. 1969), and *Office of Communication of the United Church of Christ v. FCC (UCC I)*, 359 F.2d 994 (D.C. Cir. 1966), clearly demonstrate that the FCC failed to take effective enforcement action against a broadcaster in Jackson, MS, as to which it had received from citizens evidence of discrimination over a number of years, denied those citizens standing to intervene in renewal proceedings, refused even to designate the matters for hearings and, indeed, despite essentially finding discriminatory practices, renewed that license by issuing a one-year probationary license. *UCC I*, 359 F.2d at 997-1000. Further, after having been ordered to permit intervention by complaining citizens and hold a hearing, the FCC again renewed the licenses, this time a non-probationary, full three-year license. On review, then-Judge Burger, speaking for the court, found that "[t]he Examiner and the Commission exhibited at best a reluctant tolerance of this court's mandate and at worst a profound hostility to the participation of the Public Intervenors

and their efforts." *UCC II*, 425 F.2d at 549-50 (footnote omitted). The court further held that "[t]he impatience with the Public Intervenors, the hostility toward their efforts ... plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order ..." and that "[t]he administrative conduct reflected in this record is beyond repair." As to the merits, the court held that the FCC's decision to renew the license was not supported by substantial evidence: "The Commission itself, with more specific documentation of the licensee's shortcomings than it had in 1965 has now found virtues in the licensee which it was unable to perceive in 1965 and now finds the grant of a full three-year license to be in the public interest." *Id.*, at 550. These decisions, and the underlying behavior on which they were based, make clear that the FCC not only tolerated discriminatory conduct by its licensees, but vigorously resisted the efforts of private parties and even the courts to see that it addressed discriminatory conduct by its licensees.

In Re Applications of Alabama Educational Television Commission (AETC II), 50 F.C.C.2d 461 (1975), and *In Re Applications of Alabama Educational Television Commission (AETC I)*, 25 F.C.C.2d 342 (1970), make clear that the resistance of the FCC to acting against licensees which were engaging in racially discriminatory conduct did not end with the court's decision in *UCC II* in 1969. Rather, faced with allegations of race discrimination by Alabama's educational broadcast entity during its initial term in 1969 and 1970, the FCC nevertheless granted it a license renewal in 1970, in *AETC I.* The FCC granted the license without investigation or hearings and despite a dissent suggesting that the FCC was repeating the very its errors made clear in *UCC II.* It was not until 1975, after five years of continued operation, on subsequent reconsideration that included a hearing, that the FCC reversed a hearing officer's recommendation and denied the application for renewal, in *AETC II.* These decisions indicate that the FCC and its administrative process tolerated, and insulated from citizen complaints, racial discrimination by its licensees at least until 1975.

Knowing acquiescence by a federal agency in discrimination by entities that it regulates constitutes intentional discrimination, see *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Gautreaux v. Romney*, 448 F.2d 731, 737-39 (7th Cir. 1971) ("knowing acquiescence" in a "discriminatory housing program" violates Fifth Amendment); *Clients' Council v. Pierce*, 711 F.2d 1406, 1423 (8th Cir. 1983), and providing any type of assistance to entities that tends to support or facilitate discrimination is prohibited. *Norwood v. Harrison*, 413 U.S. at 465; see *Cooper v. Aaron*, 359 U.S. 1, 19 (1958); *National Black Police Association v. Velde* 712 F.2d 569 (D.C. Cir. 1983); *Young v. Peirce*, 628 F. Supp. 1052 (E.D. Tex. 1985). The FCC's toleration of discrimination by its licensees and its licensing and renewal of licenses despite that discrimination suggests that its own conduct may have violated the Fifth Amendment's prohibition against discrimination.

Third, the FCC did not adopt any policy prohibiting discrimination until 1969, fifteen years after *Bolling v. Sharpe*, 347 U.S. 497 (1954), applied the holding of *Brown v. Board of Education* to federal decisions and five years after the Civil Rights Act of 1964. *Non-Discrimination in Employment Practices*, 18 FCC 2d 240, 16 RR 2d 1561 (1969).

Moreover, this policy was adopted only in response to petitions from organizations concerned with civil rights issues, see Historical Study, p. 91-93; *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978), and addressed discrimination only in employment. Further, although the policy provided for potential revocation of licenses for violations, the FCC eschewed primary enforcement responsibility and determined not to undertake affirmative investigative or enforcement efforts. Finally, at least for periods of time, the FCC did not enforce this policy. See, e.g., Historical Study at pp. 99-101. This behavior is consistent with acquiescence in the discrimination of others.

Fourth, the FCC failed to consider the dramatic under-representation of minorities in license ownership in licensing proceedings until directed to do so by the courts. Its 1965 Policy Statement on Broadcast Comparative Hearings, 1 F.C.C. 2d 393 (1965), the first formal statement of factors to be considered in comparative hearings for licenses, did not address the issue of minority under-representation in license ownership. Further, although the Policy did provide credit for diversification of control, the FCC did not credit minority ownership as a favorable factor in diversification. Instead, prospective minority ownership was viewed as relevant only if the applicant made a showing that the minority principals would "use their experience, background, and knowledge of the community in a way likely to result in a superior service." *Mid-Florida Television Corp.*, 33 F.C.C.2d 34, 17-18 (1970). The FCC only altered this position and its requirement of "advance assurance of superior community service" in response to judicial decisions rejecting its approach, based in part on the lack of representation of minorities among license owners. See *TV 9, Inc. v. FCC*, 495 F.2d 929, 937-38 & n. 28 (D.C. Cir. 1973).

Fifth, the FCC adopted policies that served to perpetuate the under-representation of minorities in license ownership. See Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C. 2d 424 (1970). Notwithstanding the mandate of the Communication Act that the FCC provide "a fair, efficient and equitable distribution" of broadcast facilities, 47 U.S.C. § 307(b), and the stated paramount concern with diversification of control in the 1965 Policy Statement on Broadcast Comparative Hearings, the 1970 Policy regarding renewals provided a preference for incumbent owners in license renewal comparative hearings. This Policy was held unlawful by the courts as inconsistent with the Communications Act and prior interpretations of the Act, the court noting the effect it would have on the relative absence of minority ownership in broadcasting:

> As new interest groups and hitherto silent minorities emerge in our society they should be given more stake in and chance to broadcast on our radio and television frequencies. According to the uncontested testimony of petitioners, no more than a dozen of the 7,500 broadcast licenses issued are owned by racial minorities. The effect of the 1970 Policy Statement, ruled illegal today, would certainly have been to perpetuate this dismaying situation.

Citizens Communications Center v. F.C.C., 447 F 2d 1201, 1212, n. 36 (1971). In addition, by giving credit for past experience in broadcasting in its licensing criteria, the FCC magnified the effects of the employment discrimination it recognized in the broadcasting industry, see *In the matter of Petition For Rulemaking To Require*

Broadcast Licensees To Show Nondiscrimination In Their Employment Practices, 18 F.C.C.2d 240, 242-43 (1969), from exclusion from employment in the industry to exclusion from the opportunity for license ownership. See Antoinette Cook Bush and Marc S. Martin, *The FCC's Minority Ownership Policies From Broadcasting to PCS*, 48 Fed. Comm. L. J. 423, 439 & n. 93 (1996).

Sixth, although historical license ownership data by race is largely unavailable, that information which is available shows that the results of FCC licensing under the above regime were as follows:

- No African American owned a radio station in the United States until 1949, when Jesse B. Blayton purchased WERD in Atlanta in the secondary market. See Historical Study, p. 8.

- It was not until 1960 that the first application for a broadcasting license was filed with the FCC by an African American, Andrew Langston, and it was not until more than a decade later, in 1974, that he acquired a radio broadcast license through a comparative hearing. *Id.*

- As of 1971, "of the approximate 7,500 radio stations throughout the country, only 10 [0.13%] [we]re owned by minorities" and "[o]f the more than 1,000 television stations, none [0.0%] [wa]s owned by minorities." *TV 9, Inc. v. FCC*, 495 F.2d at 937 n. 28, quoting UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, at 280 (1971) (footnote omitted).

The statistics showing the rate of minority participation in FCC licensing in 1971 as essentially nil, at less than one-seventh of one percent of radio licenses and zero percent of television licenses, represent evidence that support an inference of historical discrimination in licensing. Regardless of the fine points of statistical analysis, courts have recognized that "the inexorable zero" provides a sufficient basis for an inference of discrimination. See *Johnson*, 480 U.S. at 653, 656-57 (O'Connor, J., concurring in judgment) quoting *Teamsters*, 431 U.S., at 342, n. 23.

Further, the somewhat higher but continued very low rate of minority license ownership since then is the product of policies that were intended to increase minority ownership and, thus, do not represent a measure of the race-neutral operation of FCC licensing or the practices of industry participants. Although the FCC was very slow to address the obvious absence of minority licensees and did so largely only in response to judicial decisions and other external influences, its policies from 1971 to 1995 included measures to promote minority ownership. Thus, the only license ownership data reflecting the FCC's licensing practices unaffected by minority ownership measures is from the early 1970s, when minority ownership was nil and raises an inference of discrimination. We turn then to the FCC's minority ownership policies to assess whether they were effective.

c. FCC Minority Ownership Policies and Their Effects

As noted above, the FCC did not respond to the extreme under-representation of minority license ownership until judicial decisions directed it to do so, in the 1973 decision in *TV 9, Inc. v. FCC* and subsequent decisions. Thereafter, in comparative hearings, among other preferences, the FCC applied a preference where minority owners would participate in the management of the station, applying its reading of the *en banc* Supplemental Opinion in *TV 9*. See, e.g., *Atlas Communications,* 61 F.C.C.2d 995 (1976); Study of the Broadcast Licensing Process: History of the Broadcast Licensing Process ("Broadcasting Licensing Study"), at pp. 11-12.

It was not until 1978, that the FCC adopted its first formal policy addressing what it described as "an extreme disparity between the representation of minorities in our population and in the broadcasting industry." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 982 (1978). That Policy incorporated the standards for consideration of minority ownership and participation in comparative hearings developed in judicial decisions, *id.* at 981-82, and initiated two additional measures for "fostering the growth of minority ownership." *Id.* at 982. These measures were: first, granting tax certificates in connection with assignments or transfers of licenses to proposed parties with significant minority interests (defined as over 50% or controlling) where there was a "significant likelihood that diversity of programming will be increased," *id.* at 983; and, second, permitting a "distress sale" of a license designated for revocation or for hearings on basic qualification issues to applicants with "significant minority ownership interests." *Id.* at 983.

FCC minority ownership policies were only in effect for approximately twenty years. Credit was to have been given for minority ownership, where the owner would participate in management, in comparative hearings until 1993. In 1993, in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), credit for the integration of ownership and management in comparative hearings was declared unlawful, thus, effectively ending credit for minority ownership in comparative hearings. The FCC suspended comparative hearings in 1994. Broadcasting Licensing Study, at pp. 14-15. In addition, in 1995 Congress repealed the tax credit program. *Id.*, at p. 12. In 1997, Congress mandated the use of auctions to distribute licenses. No minority ownership measures were provided in broadcast license auctions, but first-time and small broadcasters were afforded bidding credits. *Id.*, at p. 15. Wireless licenses have been distributed through auctions and in the first three minorities were afforded bidding credits. Subsequent to the decision in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), bidding credits were available in auctions only to small businesses. FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions ("Auction Utilization Study"), at p. 8.

It is important to begin analysis of the FCC's minority ownership policies with the recognition that the policy was rooted in concepts of "diverse selection of programming" and "diversity of control of a limited resource" and not discrimination in the licensing process or the broadcast industry. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d at 981. The FCC did not examine the issue of

discrimination in licensing or in the broadcast or related industries in connection with its policy development despite the 1978 Policy's recognition that while "minorities constitute approximately 20 percent of the population, they control fewer than one percent of the 8,500 commercial radio and television stations currently operating in this country," and its repeated characterization of this under-representation as "[a]cute," *id.* at 981, and "an extreme disparity." *Id.* at 982. Nor did the FCC regard these policies as sufficient to address the severity of the under-representation: "We are keenly aware that the first steps we announce today do not approach a total solution to the acute underrepresentation problem." *Id.* at 984.

Thus, the FCC's minority ownership policies have not been premised upon, and have not specifically been designed as a cure for, what the courts have since more fully defined as a strictly remedial purpose. This appears to be attributable to guiding principles and interests of the FCC set forth in the Communications Act and their development and interpretation in policies and orders of the FCC and in judicial decisions, as discussed above, and more fully below. However, it is also the result of the fact that the FCC did not undertake a critical self evaluation of whether it's past and continuing policies, and those of its licensees and of those essential to entry into broadcasting, were discriminatory or presented discriminatory barriers to minority participation in license ownership. No such consideration was a part of the 1978 Policy.

Even in its subsequent 1986 Notice of Inquiry regarding the reexamination of minority ownership policies, the FCC did not undertake or squarely invite comment on discrimination in licensing and access to licensing. That Notice of Inquiry did not solicit information or submissions regarding discrimination in licensing or in the broadcasting industry as a basis for past or future policies. Rather, it inquired "[i]s there anything in the comparative process that acts as a barrier to the entry of minorities and women into broadcasting?" and "[w]hat are the major impediments to increasing minority ownership of the broadcast media?" only among many other questions in connection with an assessment of the effectiveness of the existing programs. See *In the Matter of Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315, 1318 (1986). It was not until the FCC commissioned the Section 257 Studies, more than 60 years after it began licensing, that the FCC inquired into the question of discrimination and discriminatory barriers to broadcasting.

Several of the Section 257 Studies analyze the impact of the FCC minority ownership measures. They are each discussed below.

1. *Study of the Broadcast Licensing Process*, consisting of three parts: *History of the Broadcast Licensing Process; Utilization Rates, Win Rates and Disparity Ratios for Broadcast Licenses Awarded by the FCC*; and *Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC* (referred to as the "Broadcasting Licensing Study").

The Broadcasting Licensing Study examines FCC licensing during that period when licenses were granted on application or, if more than one applicant, through the comparative hearing process. The Broadcasting Licensing Study discusses the history of FCC broadcast licensing (part 1), presents utilization and win rates and disparity ratios in licensing (part 2), and provides a logistic regression analysis of the license award process (part 3).

a. *History of the Broadcast Licensing Process.*

This Study reviews the history of the policy and mechanisms by which the FCC distributed broadcast licenses to provide context for the other studies. It does not contain analysis or draw conclusion regarding the effects of the policies.

b. *Utilization Rates, Win Rates and Disparity Ratios for Broadcast Licenses Awarded by the FCC.*

This Study examined several measures of utilization, or wins, compared to availability or participation of minorities in the FCC licensing process. This Study was undertaken to "assist the FCC as part of a series of studies to determine if there has been previous discrimination by the agency or passive participation by the FCC in discrimination by the private sector." Utilization Rates, Win Rates and Disparity Ratios for Broadcast Licenses Awarded by the FCC, p. 3 & n. 2. There are several features of this Study that effect its ability to measure discrimination that must be noted at the outset.

First, the Study analyzes only the FCC licensing process. It does not examine the secondary market or measure the participation or acquisition of licenses by minorities in that market.

Second, the Study does not measure whether there was discrimination in the FCC licensing process in the first six decades of broadcast licensing, when most licenses were awarded and the industry was essentially formed, or at any time when the process operated under policies that were stated to be race-neutral. Instead, the Study analyzed data only from the period during which credit for minority ownership was afforded in the licensing process. *Id.* Thus, the Study can properly be characterized as measuring whether credit appears actually to have been given for minority ownership interests in the process, that is, the effectiveness of FCC minority ownership measures, rather than whether there has been discrimination in the licensing process. Stated differently, measuring the rate at which minorities received licenses when given credit for ownership interests, does not tell us whether discrimination has adversely affected minority ownership prior to or since termination of these minority ownership measures.

Third, it is important to recognize that the Study measured "utilization" by race during this period only in comparison to "participation" defined as those who actually participated in the licensing process, i.e., comparing those who succeeded in obtaining licenses against the pools of actual applicants in the licensing process and applicants who qualified for participation in the process. That is, the Study did not attempt a traditional

measure of disparities—the rate at which minorities obtained licenses through the process ("utilization") compared to the population of minorities who were "ready willing and able" to seek a license, including those who did not apply due to discrimination affecting experience, qualification, and access to licensing ("availability"). As noted in the Study, "[i]n the contracting context, availability is measured by counting all pre-qualified contractors, not just those who apply for a given contract." *Id.* at 16. That data is not readily available because the FCC licensing process is the only source of participation in the broadcast industry. A traditional disparity study would have required the statistical formulation of minority populations that would have been in a position to participate in the process, but for discrimination. This task was not undertaken.

The Study acknowledges that its approach to availability "is narrower and more conservative than that in [the] *Croson*" decision, recommends that such an analysis be done, and suggests that, in the absence of such an analysis, its results likely are biased against identifying discrimination affecting licensing:

> We believe that this line of inquiry is certainly warranted since the availability measure is an extremely important determinant of whether one can adequately measure the existence of disparity. *If the measure of availability excludes potential applicants who have not been able to apply due to the existence of discrimination, then disparity measures that do not account for this possibility will be biased against a finding of discrimination.* On the other hand if the measure of availability is over-inclusive so that it were to include those who are not qualified, willing and able to participate in the process, then disparity measures using such a measure of availability would be biased towards a finding of discrimination. *The measures of availability that we use in this study are certainly not over-inclusive and are more likely to be under-inclusive.*

Id. (emphasis added).

While measures of disparities between the participation of minorities in the licensing process and in the general population are not generally regarded as a legally adequate demonstration of discrimination, the Study does report data demonstrating "that minority participation in broadcasting is very low relative to minority representation in the general population." *Id.*, at 17. The table referred to shows minority participation in the licensing process at only 8.9%, compared to representation at 23.8% of the nation's population. To obtain a clearer understanding of the disparities in participation in the licensing process, analysis of that data shows the participation of Black persons at 27.8% of their representation in the general population (% participation / % of population), participation at 14.8% of the Asian population, 44.8% of the Hispanic population, 0.7% of the Native American population, all compared to participation at 119.5% of the White population. *Id.* at 18, Table 3.

Fourth, the Study does not attempt to determine whether discrimination adversely affected the rates at which minority applicants qualified to participate in the licensing process. Instead, it measures only outcomes relative to those who qualified for and actually participated in the hearing process. As the Study states:

> Win rate and disparity measures that are based on a narrow definition of availability, such as the one we use here, result in a conditional measure of win rates or disparity. The disparity and availability ratios are conditional in the sense that we are testing only the second of two dimensions of the process. The first dimension of the hearing process relates to who is able to participate in a hearing; i.e. who is able to apply. The second dimension relates to who wins given that they have passed the first hurdle, i.e. been able to participate and have been included in the application and hearing process. Our analysis only considers the second of these two dimensions. If minority or female participation has been affected by impediments such as inadequate access to capital, due to discrimination, the disparity measures represented here would not capture this dimension of the licensing process.

Id., at 16-17 (footnote omitted).

Fifth, the Study does not measure whether minority participation in the licensing process was affected by the presence of the minority ownership policies. That is, the Study does not attempt to compare the rates at which minorities participated in the licensing process during the period of minority ownership policies to participation during periods when no such policies were in place, to measure whether the existence of minority ownership policies had the effect of encouraging or increasing the rate at which minorities sought to participate in broadcasting. As the Study indicates:

> Note that during the period that we are performing this analysis, the FCC's stated policy was to provide credit for minority participation in applications. Therefore, when we present win rates and disparity rates, one would expect that if the FCC's policy has been effective, there would be greater minority participation (and probably greater utilization) than in the absence of this policy. We can assume then that the level of female and minority participation, which is low relative to female and minority representation in the population, would have been even lower still in the absence of the FCC's stated policy.

Id. at 18 (footnote omitted). The Study goes on in a footnote to this paragraph:

> Without collecting data from the period before preferences were in place, it is not apparent how much additional minority and female participation has resulted from the FCC's stated policy of providing credit for minority and female participation in applications. However, it has been established that ownership of broadcast licenses was as low as 10 out of 7,500 radio stations and none of the more than 1,000 television stations held in 1971.

Id., n.15 citing *TV 9 Inc. v. FCC*, 495 F.2d 929, 937 n. 28.

A comparison of utilization in 1971, before minority ownership policies, with that subsequently presented in the Study would certainly support a conclusion that utilization

increased during the period of minority ownership policies. The Study also uses this information to make the same assumption regarding participation rates. However, because the Study did not measure participation rates prior to minority ownership policies or compare them to participation rates during the study period, it cannot safely assume that participation rates were lower prior to the policies simply because utilization rates were lower. While an assumption of lower participation rates during periods of lower utilization may be reasonable, discrimination in the licensing process prior to minority ownership policies could have produced the very low utilization rates then even with participation rates higher than that during the period of minority ownership policies. Without determining participation and utilization rates prior to minority ownership policies, the Study cannot rule out discrimination in either participation rates or utilization rates during that time.

Recognizing these limitations on the analyses, the Study provides the following information.

1. Minority participation rates in hearings was low, with 91.1% of all participants White and only 8.9% minority. Of the 8.9% minority participants, 43.1% were Black, 48.8% were Hispanic, 4.5% were Asian, and 3.7% were American Indian. The Study points out that a likely cause of low minority ownership is the low rate of participation in the process.

> A strict comparison of the number of minority ... participants to the population at large would indicate low minority ... participation in the hearing process. While we have described earlier that this is not an appropriate comparison for the purposes of Croson, it does demonstrate that for at least the first dimension of the comparative hearing process, participation; minority ownership of broadcast stations is probably low because of low participation rates. This says nothing about the issue of whether the comparative hearing award process was fair or not.

Id., at 19.

2. Measured several ways on the basis of simple participation in a winning application, minorities were parties to applications that obtained licenses at rates slightly higher than their participation, except for radio when measured by type of service (no difference), and when weighted for population of the license area (lower at insignificant level). *Id.*, at 22.

3. Measured by "relative award rate," a formulation that accounts for relative minority participation within (rather than across) hearings of different sizes and numbers of applications, minorities receive licenses at a slightly lower, but not significant, rate when minority or non-minority winners are defined by the majority of participants included in a winning applicant, and without significant difference when the race of winners is defined by holders of a majority of equity in the winning applicant. *Id.*, at 28-30.

4. Measured by definitions that identified the race of an applicant by control of greater than 50% of the equity of an application ("winner take all" definition), when compared to